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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91173189
Party	Defendant Logniko, Igor Logniko, Igor Apt. 2a, Brooklyn 7115 3rd Ave. , NY 11209
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of application Serial No. 78/612,360 TEMPLATEMONSTER

MONSTERCOMMERCE, LLC

Opposer,

v

Opposition No. 91173189

IGOR LOGNIKOV

Applicant.

**APPLICANT’S RESPONSE TO OPPOSER’S MOTION FOR PARTIAL JUDGMENT
ON THE PLEADINGS**

COMES NOW, the Applicant, IGOR LOGNIKOV (“Applicant”), by and through his undersigned counsel, who respectfully responds in opposition to MONSTERCOMMERCE, LLC’S (“Opposer”) motion for partial judgment on the pleadings. Opposer seeks a “partial judgment” regarding certain of the affirmative defenses Applicant raises in his Answer and Affirmative Defenses, i.e., the equitable defenses of laches and estoppel, and the legal defense of legal estoppel. For the reasons asserted below, both on procedure and in substance, the motion should be denied.

I. Procedure

Procedurally, Opposer’s motion for judgment on the pleadings is not an appropriate method for testing the sufficiency of the affirmative defenses. *Damonte v. Higgins Industries, Inc.*, 2 F.R.D. 486 (D.C. La. 1942). Rather, in challenging fewer than all of the defenses raised, Opposer should have proceeded under Rule 12(f) of the Federal Rules of Civil Procedure to strike, rather than Rule 12(c) for judgment on the pleadings. *Eastern Air Lines, Inc. v. Atlantic Richfield Co.*, 470 F. Supp. 1050 (S.D. Fla. 1979) *aff’d* 609 F.2d (Em Ct. App. 1979). However, under Rule 12(f),

Opposer had twenty days from service of Applicant's affirmative defenses within which to file a motion to strike. Because Applicant's pleading containing the affirmative defenses was served on December 20, 2006, Opposer's pending motion served on January 31, 2007 is untimely. Even if the motion were timely, a ruling on the equitable defenses should wait until the factual record has been developed. *Pro-Football, Inc. v. Harjo*, 57 U.S.P.Q. 2d 1140 (D.C. Col. 2000). *See Id.* at 415 F.3d 44 (C.A.D.C. 2005). The proceeding just commenced, and the factual record has not yet been compiled.

II. Substance of argument

A. Equitable defenses of laches and estoppel

Opposer argues that "the defenses of laches and equitable estoppel do not start running until the date the [subject service mark] application was published for opposition." (Motion, pp. 3-4). This argument renders 15 U.S.C. §1069 a nullity in connection with an opposition inter partes proceeding. In essence, Opposer contends that the equitable principles of laches and estoppel are prohibited defenses in an opposition proceeding since there can be no undue time delay involved in the statutory thirty day period within which an opposition must be filed after publication. *See* 15 U.S.C. §1063. This interpretation derogates from the statutory language of §1069 which provides that "[i]n **all** inter partes proceedings equitable principles of laches, estoppel, and acquiescence, where applicable may be considered and applied. (Emphasis Added). Opposer's argument conflicts with the "all" language of the statute. *See also Jack's Cookie Cos. v. Mama Weiss Foods, Inc.*, 133 U.S.P.Q. 663 (TTAB 1962). *Accord Standard Oil Co. v. Chessco Industries, Inc.*, 168 U.S.P.Q. 667 (TTAB 1971)(equitable defenses of laches and estoppel must be determined on the merits).

B. Legal defense of legal estoppel

Opposer, by its own admission, cannot locate a single case in which legal estoppel was prohibited from being applied as a defense in an opposition proceeding. Since the Opposer has not presented any case law supporting its motion regarding the subject legal defense, because the factual record has not yet been developed, and in a light most favorable to the Applicant as the non-moving party, there is no support in the record for striking Applicant's legal estoppel defense.

III. Conclusion

The motion is flawed both procedurally and in substance. Based upon the arguments of Applicant, the motion, respectfully submitted should be denied.¹

Respectfully submitted,

s/Richard S. Ross, Esq.
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¹In its Conclusion (Motion, p. 5), the Opposer requests suspension of the proceedings pending "disposition of Opposer's Motion to Amend." Applicant is not aware of any pending motion to amend filed by Opposer; its only motion to amend was addressed by the ruling of the Board on December 13, 2006, and attached as Exhibit D to the present motion. To the extent any such motion exists, Applicant opposes it.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by United States Postal Service first class regular mail, and addressed to counsel for the Opposer:

Brian J. Winterfeldt
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this 2nd day of February, 2007.

s/Richard S. Ross, Esq.
Richard S. Ross, Esq.